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No. 83-911
No. 83-927

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
*Appellants,*

v.

ABE RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW MEXICO

## REPLY BRIEF OF APPELLANT ANHEUSER-BUSCH, INC. IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellant Anheuser-Busch, Inc. ("Anheuser-Busch") respectfully submits this reply brief in opposition to the motion of appellee Abe Rodriguez, Director of the New Mexico Department of Alcoholic Beverage Control ("New Mexico"), to dismiss or affirm.

## PRELIMINARY STATEMENT

New Mexico's motion for summary affirmance is based on the fundamentally erroneous premise that courts need not balance state interests against the burdens imposed on interstate commerce in determining the constitutionality of beer pricing statutes under the Commerce Clause. The state does not contend that its beer price affirmation statute furthers any interest whatsoever. New Mexico instead claims that the mere fact that the provisions of its statute are similar to those of a liquor affirmation statute sustained by this Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, *reh'g denied,* 384 U.S. 967 (1966), forecloses the need to conduct a Commerce Clause analysis and renders the statute immune from constitutional scrutiny. But such a mechanical approach is inconsistent with *Seagram* itself and the cases which follow it, particularly *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *Seagram* contained, and *Midcal* expressly requires, a balancing of the state and federal interests involved in determining the constitutionality of the New Mexico statute. Since New Mexico has utterly failed to advance any state interest promoted by the beer price affirmation provisions and, as New Mexico implicitly concedes, the lower courts failed to apply any balancing test in granting New Mexico's motion for summary judgment, the instant motion for summary affirmance or dismissal must be denied.[1]

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[1] New Mexico also asserts that since the statute challenged here has been repealed, Anheuser-Busch may not complain about the burdens such a statute imposes upon interstate commerce. At the same time, however, New Mexico asserts that Anheuser-Busch will be liable if the constitutionality of the statute is affirmed by this Court. (Motion to Dismiss or Affirm at 3) Obviously, New Mexico cannot have it both ways. An affirmance by this Court based upon a refusal to consider the statute's effects and validity because it has been repealed would permit New Mexico, with the approval of its highest court, to try to collect monetary penalties for alleged violations of an unconstitutional statute.

## ARGUMENT

### THE STATE'S INTERESTS, IF ANY, MUST BE BALANCED AGAINST THE FEDERAL INTEREST IN UNRESTRICTED COMMERCE

New Mexico argues essentially that since the present action involves a so-called "facial attack" upon the beer price affirmation provisions, (as opposed to an attack upon some application of those provisions), no balancing was required of the state interests, if any, advanced by the beer pricing scheme against the burdens upon, and strong federal interest in, interstate commerce. It contends that the similarity of language between this statute and the one approved in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* 384 U.S. 35 is enough to require summary affirmance of the statute as constitutional.

Such an argument makes no sense as a matter of policy and would require the repudiation of numerous decisions of this Court. Contrary to New Mexico's unsupported assumption that "facial attacks" do not require any balancing, this Court has repeatedly balanced the respective state and federal interests and invalidated state liquor laws *on their face,* as being repugnant to the Commerce Clause, *e.g., United States Brewers Association, Inc. v. Healy,* 692 F.2d 275 (2nd Cir. 1982), *aff'd,* 104 S.Ct. 265 (1983), the Supremacy Clause, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra,* 445 U.S. 97, and the Equal Protection Clause. *Craig v. Boren,* 429 U.S. 190 (1976).

Facial invalidation is particularly appropriate here. Anheuser-Busch's position is not that some particular price it may be forced to set in New Mexico will be in some sense "unfair" but rather that the Commerce Clause permits it to set prices throughout the nation as competitive conditions mandate without being constrained by the requirement that its New Mexico prices be no higher than the lowest price at which it chooses to sell elsewhere.

New Mexico's claim that this Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* 384 U.S. 35, did not involve a "balancing of interests" is simply incorrect. The

Court did apply a balancing test in holding that the "drastic" remedy of price affirmation was justified in that case because the overwhelming evidentiary record submitted by the state, including specific legislative findings, established that it was necessary to advance important state interests—breaking the monopolistic grip of distillers in the state. 384 U.S. at 39. Thus, in *Seagram* this Court only upheld the statute after having determined that the state interests advanced by New York were substantial, but New Mexico has not and cannot make a similar showing here.[2] *Seagram* certainly does not give carte blanche approval to all legislation which tracks the language of the New York statute.

This reading of *Seagram* is confirmed by *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra,* 445 U.S. 97. In *Midcal,* this Court held that for statutes involving pricing of alcoholic beverages, the Twenty-first Amendment *requires* a balancing of the state's alleged interests in the legislation against the strong and familiar federal interests in competition and interstate commerce. After initially determining that the state legislation in *Midcal* constituted a violation of the Sherman Act, the Court considered the state's purported Twenty-first Amendment interests—temperance and orderly market conditions—and found them to be substantially

[2] The New Mexico courts, like the federal courts, may grant a motion for summary judgment only where there is no genuine issue as to any material fact, and the burden is on the movant to establish that it is entitled to judgment as a matter of law. N. M. Stat. Ann., Civ. P. R. 56; *Westgate Families v. City Clerk of Los Alamos,* 100 N.M. 146, 667 P.2d 453 (1983). In the present case, New Mexico moved for summary judgment and the district court granted the motion despite the terms of the statute and the evidence submitted by appellants, which raised serious questions concerning the burdens imposed on commerce. New Mexico failed to introduce any evidence to rebut that showing nor even asserted any valid state interests. Indeed, on the record before the New Mexico courts, it was appellants who were entitled to summary judgment.

outweighed by the federal interests, derived from the Commerce Clause,[3] in interstate competition. Accordingly, the Court declared the legislation to be invalid.

This Court's decision in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), upon which New Mexico heavily relies, involves application of the same principles as *Midcal*. The only difference was that in *Rice* the Court determined that that statute, which merely regulated the manner in which alcoholic beverages could be imported into California, did not create a violation of the Sherman Act. Thus, no federal interest in competition was burdened by the statute and there was nothing to balance against the state's interest.[4]

The New Mexico beer price affirmation provisions, in contrast, by their terms restrain a brewer from freely setting prices in all states outside New Mexico. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Just as in *Midcal* where the in-state wine price maintenance regulations were found to unconstitutionally violate the Sherman Act, the affirmation provisions unconstitutionally burden interstate commerce, and therefore New Mexico was required to put forward some state interests to support the legislation.

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[3] This Court in *Midcal*, 445 U.S. at 111, emphasized that the federal interests implicated therein were those embodied in the Commerce Clause because Congress " 'exercis[ed] all the power it possessed' under the Commerce Clause" when it enacted the Sherman Act. (citations omitted) In the present case, as Anheuser-Busch has demonstrated in its Jurisdictional Statement at 10-15, and New Mexico does not dispute, the statute under attack violates the Commerce Clause unless saved by the Twenty-first Amendment.

[4] *Rice* is inapplicable to the present case on two additional grounds. Initially, to the extent that appellants are challenging the New Mexico beer price affirmation provisions as being violative of the Commerce Clause, not the Sherman Act, the Court's holding in *Rice* is irrelevant. Furthermore, unlike the statutes in *Midcal* and in this case which regulate the setting of prices, the regulation challenged in *Rice* concerned the importation of alcoholic beverages into a state. *Midcal* recognized that states are permitted far broader discretion in regulating the means of importing and distributing alcoholic beverages within their boundaries than in regulating prices. 445 U.S. at 110.

Indeed, New Mexico has not attempted to refute or challenge the inevitable deleterious effects the beer price affirmation provisions have upon interstate commerce—elimination of pricing flexibility in other states, the regulation of prices in markets outside of New Mexico and lock-step price ceilings —which were set forth in Anheuser-Busch's Jurisdictional Statement and presented to the courts below. In fact, its only answer is to point out that the statute has since been amended (Motion to Dismiss or Affirm at 9-10), thereby virtually conceding that the old New Mexico beer price affirmation law, which New Mexico claims is automatically constitutional, would, if enacted by other states, have disastrous results.[5] Since New Mexico has concededly set forth no valid state interest that could possibly justify such burdens, the summary judgment ruling sustaining the constitutionality of the statute must be reversed.

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[5] New Mexico's hypothetical assertion that any burdens which the statute imposed upon interstate commerce might have been avoided by the Director of the Department of Alcoholic Beverage Control, pursuant to his statutory power to permit deviations from the requirements of the law, is specious. Such deviations can be granted only on a finding of good cause and may not be given for any reason which is inconsistent with the purposes of the law. N.M.S.A. § 60-12-4. Furthermore, New Mexico's position is inconsistent with the evidence of its own officers. James Baca, then the Director of the Department of Alcoholic Beverage Control, testified at his deposition (i) that if a brewer reduced prices in Wisconsin to meet competition he would not be given an exemption in New Mexico and would be required to lower his prices since the Director had "no other choice" under the law, Baca Dep. at 73-74, 89, 96-97; (ii) that brewers could not give price reductions to reflect increased shipping costs, Baca Dep. at 80; and (iii) that brewers would not be given exemptions to sell distressed beer (beer which is near expiration of its useful shelf life) at reduced prices in other states Baca Dep. at 98-99. In any event, the fact that a party suggests in response to a lawsuit, that under some undefined circumstances he may refrain from enforcing an unconstitutional statute does not render that statute valid. Cf. *United States v. Concentrated Phosphate Exporting Association*, 393 U.S. 199, 203 (1968).

## CONCLUSION

Based upon the foregoing, it is respectfully submitted that New Mexico's Motion To Dismiss or Affirm should be denied and that this Court should note probable jurisdiction, or summarily reverse in light of prior rulings of this Court.

Respectfully submitted,

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